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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 ARIEL VARONA MARTINEZ,

14 Defendant.  
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Case No. 2:99-cr-038-KJD-RJJ

**ORDER**

16 Presently before the Court is Defendant Martinez' Motion for Writ of *Coram Nobis* (#101).  
17 Plaintiff filed a response in opposition (#109) to which Defendant replied (#111).

18 **I. Background**

19 On February 3, 1999, Defendant Ariel Varona Martinez was charged with conspiracy to  
20 possess with the intent to distribute five kilograms of cocaine, attempt to possess with intent to  
21 distribute, and possession of a firearm in relation to a drug trafficking crime. Defendant plead guilty  
22 on all counts on October 8, 1999, pursuant to a plea agreement dated September 15, 1999. Defendant  
23 was sentenced to seventy months in federal prison on May 26, 2000 and the Court entered judgment  
24 on May 30, 2000.

25 After Defendant's release in March 2004, immigration authorities took Defendant into  
26 custody and executed a removal order. Defendant's Cuban nationality prevents the typical

1   detainment and deportation that occurs when immigrants are convicted of an aggravated felony.  
2   Instead, Immigration Customs Enforcement currently requires Defendant to meet with the agency  
3   every three months for an indefinite period of time.

4           Defendant filed a Motion for Writ of *Coram Nobis* Vacating Guilty Plea and Conviction on  
5   June 28, 2011. In the Motion, Defendant alleges that the previous attorney violated Defendant's  
6   Sixth Amendment rights by failing to advise of the potential immigration consequences of a guilty  
7   plea.

## 8   II. Legal Standard for a Writ of Coram Nobis

9           “*Coram nobis* is an extraordinary writ, used only to review errors of the most fundamental  
10   character.” Matus-Leva v. United States, 287 F.3d 758, 760 (9th Cir. 2002). Four requirements must  
11   be met to qualify for *coram nobis* relief: (1) a more usual remedy is not available; (2) valid reasons  
12   exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction  
13   sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most  
14   fundamental character. United States v. Kwan, 407 F.3d 1005, 1011 (9th Cir. 2005) (quoting Estate  
15   of McKinney v. United States, 71 F.3d 779, 781 (9th Cir. 1995)).

## 16   III. Analysis

17           Defendant's Motion for Writ of *Coram Nobis* is denied because the Supreme Court decision  
18   in Chaidez v. United States preempts the current case. 133 S. Ct. 1103, 1105, 1112-13 (U.S. 2013).  
19   Chaidez holds that Padilla v. Kentucky, 176 L. Ed. 2d 284 (U.S. 2010) (holding that attorneys must  
20   inform clients of potential deportation issues from pleading) does not retroactively apply. Id.

21           An individual no longer in custody may employ a writ of *coram nobis* to make a Sixth  
22   Amendment assistance of counsel attack on his conviction. United States v. Mett, 65 F.3d 1531,  
23   1534 (9th Cir. 1995). Such an attack satisfies the fundamental error requirement laid out by Kwan.  
24   See 407 F.3d at 1014. The Sixth Amendment grants the right to effective counsel. Strickland v.  
25   Washington, 466 U.S. 668, 686 (U.S. 1984). In Strickland, a two-prong inquiry was created to  
26   identify Sixth Amendment violations. Id. at 688, 694. The inquiry analyzes whether (1) the counsel's

1 assistance falls below an objective standard of reasonableness and (2) if there is a reasonable  
2 probability that, but for counsel's unprofessional errors, the result of the proceeding would have been  
3 different. Id.

4 In the following years, courts almost unanimously concluded that the Sixth Amendment  
5 required attorneys to inform their client of direct consequences of a conviction, but did not require  
6 the disclosure of a conviction's collateral consequences, such as deportation. See Chaidez, 133 S. Ct.  
7 at 1109-10. As a collateral consequence, Strickland did not apply to deportation. See Id. In 2010, the  
8 Supreme Court changed this when it held "that counsel must inform her client whether his plea  
9 carries a risk of deportation." Padilla, 176 L. Ed. 2d at 299. Additionally, the collateral versus direct  
10 distinction was held to be "ill-suited to evaluating a Strickland claim concerning the specific risk of  
11 deportation." Id. at 294.

12 Defendant asserts that a grant of writ of *coram nobis* is appropriate because the current case  
13 satisfies the prerequisites set out by Kwan, in light of Padilla. Defendant alleges that previous  
14 counsel failed to advise of the potential immigration consequences of the guilty plea in September,  
15 1999, which is an error of the most fundamental nature under Padilla. Such an analysis is correct;  
16 however, the recent Supreme Court ruling of Chaidez v. United States, decided on February, 20,  
17 2013, preempts the use of Padilla in the present case. 133 S. Ct. at 1105, 1112-13.

18 In Chaidez, the Supreme Court clarified Padilla, holding that it did not have retroactive effect  
19 and is not applicable to those who received a final conviction prior to the Padilla decision. See Id. at  
20 1103. The crux of the issue in Chaidez is whether Padilla created a new rule, since new rules do not  
21 retroactively apply to already-final criminal convictions. Id. at 1107. The Supreme Court held that  
22 Padilla was a new rule because it imposed a new obligation on attorneys. Id. at 1107-10. Padilla's  
23 holding went against the then-dominant view of deportation by holding that a lawyer must advise of  
24 potential deportation risks. See Id. at 1110. As a result, "defendants whose convictions became final  
25 prior to Padilla . . . cannot benefit from its holding." Id. 1113.

1 The facts of Chaidez closely mirror those of the present case. Chaidez describes the situation  
2 of a woman who is not a native of the United States. Id. at 1105. The woman pled guilty to an  
3 aggravated felony and, upon completion of her sentence, faced immediate deportation. Id. at 1106.  
4 The woman alleged in a petition for a writ of *coram nobis* that her previous counsel never advised  
5 her of the potential immigration consequences of her plea, which constituted ineffective assistance of  
6 counsel under the Sixth Amendment. Id. The Supreme Court decided Padilla while the petition was  
7 pending and vindicated the woman's view on the Sixth Amendment. Id. However, the Court's ruling  
8 in Chaidez prevented her from benefitting from Padilla's holding. Id. at 1113.

9 Chaidez similarly prevents Defendant from benefitting from the Padilla holding. Defendant's  
10 conviction became final years before Padilla was decided. Chaidez held that Padilla is not  
11 retroactive. The Court, therefore, cannot grant Defendant's Motion for Writ of *Coram Nobis*.

12 IV. Conclusion

13 Accordingly, IT IS HEREBY ORDERED that Defendant Martinez' Motion for Writ of  
14 Coram Nobis (#101) is **DENIED**.

15 DATED this 23rd day of May 2013.

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19 Kent J. Dawson  
20 United States District Judge  
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